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THE WTO DISPUTE SETTLEMENT MECHANISM

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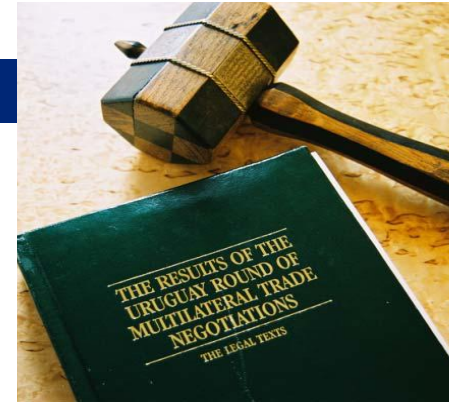
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LEGAL BASIS



At multilateral level:

- GATT 1994 – Articles XXII-XXIII ([EN-UKR](#))
- Dispute Settlement Understanding (DSU) ([EN-UKR](#))
- Other Agreements, e.g. Articles 4 and 7 of the Agreement on Subsidies and Countervailing Measures ([EN-UKR](#)), Article 17 of the Anti-dumping Agreement ([EN-UKR](#)) etc.



INTRODUCTION

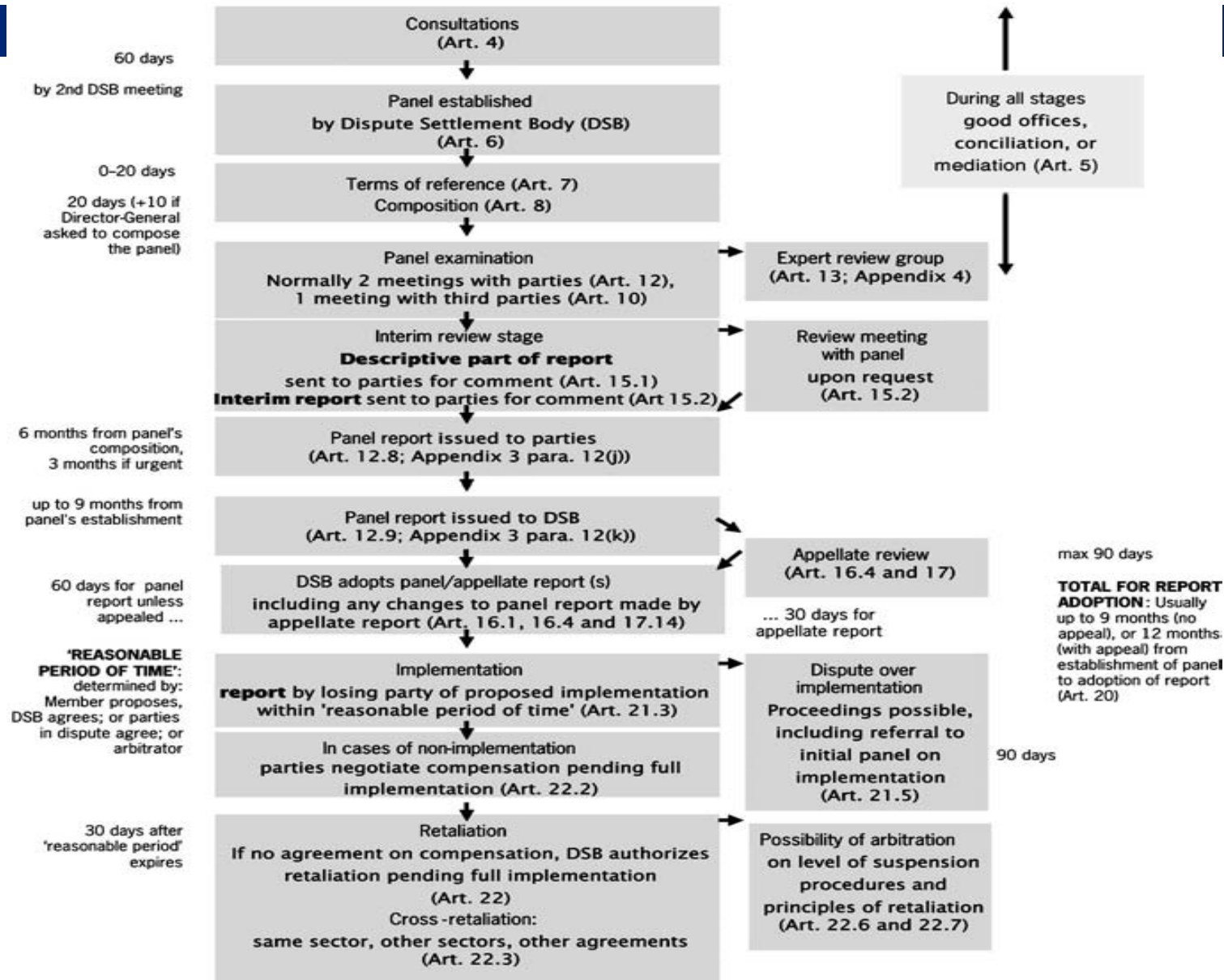
- Aim: “to secure a positive solution to a dispute...”
- Functions
- Additional features
- Participants: DSB, panels, AB etc.
- Types of complaints
- Measures that can be challenged
- Value of precedent



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Source: [“A Handbook on the WTO Dispute Settlement System”](#)





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CONSULTATIONS

- Request made by one or more Members to another Member
- **Confidential** process among the parties
- “attempt to obtain a satisfactory adjustment of the matter”



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CONSULTATIONS

- Request must be presented **in writing**
- Indicate reasons for the request:
 - identification of the measures
 - legal basis for complaint
- Addressed to the Member concerned, copied to DSB and relevant Councils and Committees
- Circulated to Members (WT/DS.../1)



REQUEST FOR CONSULTATIONS

a. RECAP

RECAP is Brazil's "Special Regime for the Purchase of Capital Goods for Exporting Enterprises" (*Regime Especial de Aquisição de Bens de Capital para Empresas Exportadoras*), established under Lei nº 11,196 of 25 November 2005 and Decreto nº 5,649 of 29 December 2005, and implemented through a number of related regulations. Under this programme, Brazil suspends the application of several taxes and charges including PIS/PASEP, COFINS, PIS/PASEP-*Importação* and COFINS-*Importação* for "predominantly exporting companies",¹⁰ generally including companies that obtained at least 50 percent of their gross turnover from exports in the preceding calendar year as well as companies that did not meet such a 50 percent export threshold but commit to do so over the next three years, as regards the domestic purchase or importation by such companies of machinery, tools, instruments and other equipment. The suspension ultimately becomes a zero rate when certain conditions are met.

In order to benefit from RECAP, "predominantly exporting companies" must obtain "accreditation" (*habilitação*) from the Secretariat of the Federal Revenue in the Ministry of Finance (*Secretaria da Receita Federal of the Ministério de Fazenda*). They may enjoy the benefits under RECAP on condition that they undertake to maintain for the following two or three years (as the case may be) a level of exports equal to or higher than 50 percent of their annual gross turnover and then fulfil those undertakings.

Without necessarily being exhaustive, Japan understands that RECAP is established and administered through the following legal instruments in particular:

- Lei nº 11,196 of 25 November 2005;
- Lei nº 12,715 of 17 September 2012;
- Decreto nº 5,649 of 29 December 2005;
- Decreto nº 5,789 of 25 May 2006;
- Decreto nº 6,759 of 5 February 2009 (especially Livro III, Title II, Chapter VII, Section IV);
- Instrução normativa SRF nº 605 of 4 January 2006;
- accreditations (*habilitações*) granted pursuant to the RECAP programme;
- as well as any amendments or extensions, any replacement measures, any renewal measures, any implementing measures, and any other measures related to those listed above.

The RECAP programme, as established and administered by the above-mentioned instruments and also as applied by the relevant Brazilian authorities, is inconsistent with Brazil's obligations under Articles 3.1(a) and 3.2 of the SCM Agreement.

Article 4.2 of the SCM Agreement requires that requests for consultations under Article 4.1 of the SCM Agreement include a statement of available evidence with regard to the existence of and nature of the subsidy in question. The available evidence is listed in Annex C to this request.

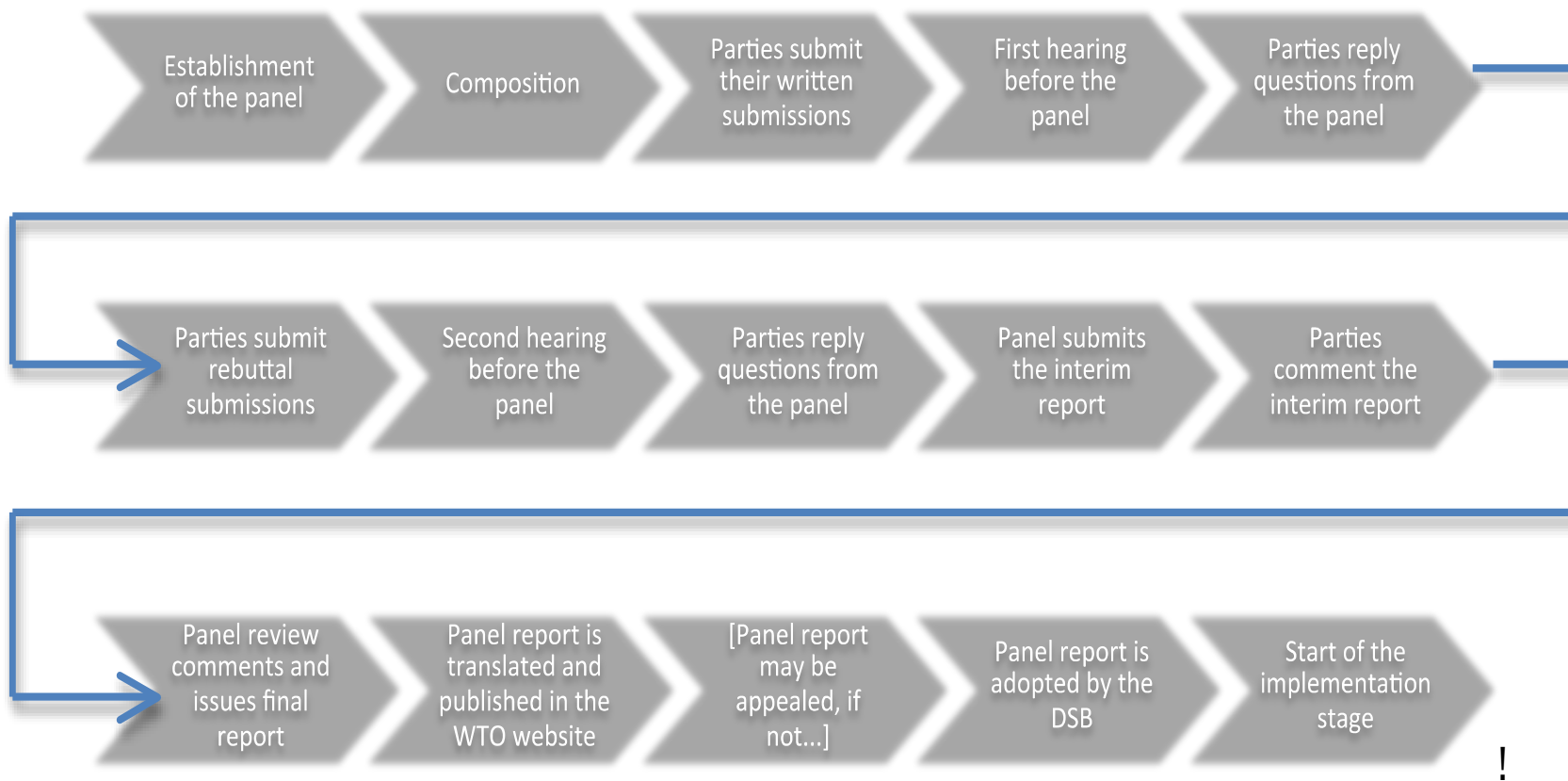


CONSULTATIONS

- Request must be responded within **10 days**; consultations must be entered in good faith within **30 days**
- If consultations succeed in resolving the matter:
 - notification of mutually agreed solution
- **If consultations fail to resolve the matter after 60 days**
- Right to request the establishment of a panel
 - (Urgency procedure under DSU Art. 4.8)



WTO DSM – PANEL PROCEDURE





WTO DSM – REQUEST FOR ESTABLISHMENT

- Request must be submitted in writing and indicate whether consultations were held
- Content of the request:
 - Identify the specific **measures** at issue
 - Present a brief summary of the legal basis (**claims**)
- Establishment of the panel by reverse consensus (at second DSB meeting)



WTO DSM – REQUEST FOR ESTABLISHMENT

A. RECAP

RECAP is Brazil's "Special Regime for the Purchase of Capital Goods for Exporting Enterprises" (*Regime Especial de Aquisição de Bens de Capital para Empresas Exportadoras*), established under Lei nº 11,196 of 25 November 2005 and Decreto nº 5,649 of 29 December 2005, and implemented through a number of related regulations. Under this programme, Brazil suspends the application of several taxes and charges including PIS/PASEP, COFINS, PIS/PASEP-*Importação* and COFINS-*Importação* pertaining to the domestic purchase or importation of machinery, tools, instruments and other equipment by "predominantly exporting companies",¹⁰ generally including companies that obtained at least 50 percent of their gross turnover from exports in the preceding calendar year as well as companies that did not meet such a 50 percent export threshold but commit to do so over the next three years. The suspension ultimately becomes a zero rate when certain conditions are met.

In order to benefit from RECAP, "predominantly exporting companies" must obtain "accreditation" (*habilitação*) from the Secretariat of the Federal Revenue in the Ministry of Finance (*Secretaria da Receita Federal* of the *Ministério de Fazenda*). They may enjoy the benefits under RECAP on condition that they undertake to maintain for the following two or three years (as the case may be) a level of exports equal to or higher than 50 percent of their annual gross turnover and then fulfil those undertakings.

Without necessarily being exhaustive, Japan understands that RECAP is established and administered through the following legal instruments in particular:

- Lei nº 11,196 of 25 November 2005;
- Lei nº 12,715 of 17 September 2012;
- Decreto nº 5,649 of 29 December 2005;
- Decreto nº 5,789 of 25 May 2006;
- Decreto nº 6,759 of 5 February 2009 (especially Volume III, Title II, Chapter VII, Section IV);
- Instrução normativa SRF nº 605 of 4 January 2006;
- accreditations (*habilitações*) or registrations (*registros*), and related acts, pertaining to individual "predominantly exporting companies" granted pursuant to the RECAP programme;
- as well as any amendments or extensions, any replacement measures, any renewal measures, any implementing measures, and any other measures related to those listed above.

The RECAP programme and each of the legal instruments through which it is established and administered – both individually and collectively – are inconsistent *as such* and *as applied* with Articles 3.1(a) and 3.2 of the SCM Agreement, because they are and/or confer subsidies within the meaning of Article 1.1 of the SCM Agreement that are contingent upon export performance.



WTO DSM – PANEL’S TERMS OF REFERENCE

- Terms of reference establish the panel’s jurisdiction
 - Standard ToRs
- Matter referred to a panel consists of:
 - The **claims** and the **measures** at issue



WTO DSM – PANEL’S COMPOSITION

- “well-qualified government and/or non-governmental individuals”
 - No nationals of parties or third parties (unless parties agree)
 - rules of conduct
- Secretariat proposals
 - Indicative list of panellists
 - “Compelling reasons” for rejection
- If no agreement: nomination by the Director General, upon request of either party





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WTO DSM – THIRD PARTIES

- Members having a **substantial interest** may participate in a dispute
- They have the right to receive the first written submission of the parties, make a written submission and to participate in the first hearing
- Additional rights may be conferred to them

Ukraine has reserved third party rights in 4 cases concerning the Tobacco Plain Packaging Act of Australia; in 3 trade defence cases (anti-dumping and safeguards); and in 2 cases concerning general GATT, investment measures and customs valuation matters. In 5 cases, the Russian Federation is one of the parties to the dispute



WTO DSM – PANEL’S FUNCTION

- A panel should make an **objective assessment of the matter before it**, including an objective assessment of:
 - the **facts** of the case
 - the **applicability** of the relevant covered agreements
 - **conformity with the relevant covered agreements**
- Special rules in AD Agreement (Art. 17.6)



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WTO DSM – PANEL'S WORK

- Successive written and oral phases
 - ✓ Organization meeting and working procedures
 - ✓ First submissions
 - ✓ First substantive meeting and questions
 - ✓ Concurrent rebuttals
 - ✓ Second meeting and additional questions





WTO DSM – PANEL’S REPORTS

- The interim report – Interim review stage
 - Circulation of descriptive part
 - Circulation of “interim report”
 - Parties’ written request for review
 - Interim review meeting upon request
- Final report is issued to the parties
- Report is translated and placed in the website



WTO DSM – PANEL’S REPORT CONTENT

- The panel’s final report should contain:
 - Findings of fact
 - Applicability of relevant provisions
 - Rationale behind findings and recommendations
- Structured in two parts:
 - Descriptive part (factual findings and parties’ arguments)
 - Findings and conclusions



WTO DSM – TIMEFRAME PANEL

- General rule: **6 months** from composition / terms of reference to issuance of final report to parties (Art. 12.8 DSU)
 -Unless the panel cannot
- General rule: **9 months** from establishment of panel to consideration of report for adoption (if no appeal)



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WTO DSM – APPELLATE PROCEDURE

- Standing Appellate Body, appointed by the DSB
 - Supported by a Secretariat
- 7 members / Unaffiliated with any government
- Appeal only available on issues of law and legal interpretations
- Appeal only open to parties in dispute
- Divisions of 3 Members
- Collegiality (Exchange of Views)
- Confidentiality
- Strict Time Frame





WTO DSM – APPELLATE PROCEDURE

- What can the Appellate Body do?
 - Findings and Conclusions (Recommendation)
 - **Uphold, modify or reverse** findings and conclusions of panels
 - No remand authority, but may “complete the legal analysis”



WTO DSM – RECOMMENDATIONS

- **If violation:**
 - Member must **bring its measures into conformity** – Losing Member's decision how to do it
 - Special situations (e.g. Arts. 4 and 7 ASCM)
- **If no violation, but nullification or impairment:**
 - Mutually satisfactory adjustment



WTO DSM - ADOPTION

- Adoption of panel reports
 - Consideration by Members, not before **20 days** after circulation
 - Adoption within **60 days**, unless **negative consensus**
- Adoption of panel reports when appealed
 - Appellate Body *and* panel report are adopted by negative consensus



WTO DSM - IMPLEMENTATION

- Within **30 days** of adoption of report:
 - Member concerned informs the DSB of its intentions in respect of implementation of the recommendations and rulings
- **Preferably, immediate compliance**
- If necessary: Determination of “**reasonable period of time**” for implementation:
 - proposed by Member and approved by the DSB;
 - mutually agreed by the parties; or,
 - determined through **arbitration**. Guideline: 15 months from date of adoption



WTO DSM – COMPLIANCE

- **Is the determination properly implemented?**
- If there is disagreement:
 - **Compliance panel** (original panel preferred)
 - Recourse to “these dispute settlement procedures”
 - Circulation of the report: 90 days
 - Appeal possible
 - No more “reasonable period of time”



WTO DSM – NON-IMPLEMENTATION

- **Compensation**
 - Voluntary / Negotiated
 - Temporary, until compliance
 - Compatible with WTO Agreements
- If no compensation agreed within **20 days** after expiry of reasonable period of time...
 - Affected Member may request **“Suspension of concessions” (next slides)**



WTO DSM – NON-IMPLEMENTATION

- Request for retaliation authorization must:
 - Specify the Agreement and sector(s) under which it will be applied.
 - *In the order given by Art. 22.3 DSU*
 - Set out a specific level of suspension
 - *Equivalent to nullification and impairment*
 - *Special rules, e.g. Arts. 4.10 and 7.9 ASCM*



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WTO DSM – NON-IMPLEMENTATION

- Principle: level of suspension to be suspended must be **equivalent to nullification or impairment**
 - **Equivalence:** correspondence, identity or balance



WTO DSM – NON-IMPLEMENTATION

- Arbitration on:
 - Level of suspension or on principles of Art. 22.3 DSU
- The arbitrator may **not** review the nature of the proposed measure
- Arbitral award: within 60 days of expiry of the reasonable period of time



USE OF THE WTO DSM

- 499 requests for consultations (RfC) (until 24 Oct. 2015)
- 170 panel reports published, covering more than 200 disputes (until Dec. 2014)
- 132 Appellate Body reports issued
- Continued prevalence of trade remedies (2015: 8 out of 11 RfC are related to trade defence instruments/subsidies; 2014: 7 out of 14); also several TBT and SPS-related cases
- Main Members involved (2014-2015): EU-10, IDN-8, RUS-7, US-5, CHN-3, Taiwan-3, **UKR-2**, Other-12
- Panels established/composed (2014): 12 out of 14 RfCs
- MAS (2014-2015): 1



UKRAINE AND THE WTO DSM

- In 4 cases Ukraine has acted as complainant; in 1 case, Ukraine has requested the establishment of a panel
- In 3 cases Ukraine has been complained against; in 1 case a panel has been established to examine a safeguard measure; the panel report has been published in 2015
- In 11 cases, Ukraine has reserved third party rights; in a few cases it has intervened
- In at least 1 case, a satisfactory solution could be reached through the consultations
- And the future?



UKRAINE AND THE WTO DSM

DS 411 (2010) - Ukraine vs. Armenia

- Title: Measures Affecting the Importation and Internal Sale of Cigarettes and Alcoholic Beverages
- Measures:
 - Armenia's law “On Presumptive Tax for Tobacco Products” of 24 March 2000. Claims:
 - Article III: Armenia levies discriminatory internal taxes on imported tobacco products,
 - Article II: The law imposes customs duties on such imported tobacco products at a rate of 24 per cent, which is higher than Armenia's WTO bound rate of 15 per cent;
 - Law “On Excise Tax” of 7 July 2000. Claim:
 - Article III: applies higher excise taxes on imported alcoholic beverages than on like domestic products
- Problem resolved without the need for a panel to adjudicate



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UKRAINE AND THE WTO DSM

“"Торговое разбирательство отняло бы значительное время. Для бизнеса быстрое решение проблемы более выгодно",— говорит Наталья Микольская."

Excerpt from the “Украина раскурила трубку мира”, published in the [Kommersant](#) newspaper describing the agreement between the Ukrainian and Armenian Governments to solve the litigious matter



UKRAINE AND THE WTO DSM

DS 421 (2011) - Ukraine vs. Moldova

- Title: Measures Affecting the Importation and Internal Sale of Goods (Environmental Charge)
- Measures:
 - Law “On Charge for Contamination of Environment” of 25 February 1998 which imposes two types of charges on imported products only: (i) a charge on imported products, the use of which contaminates the environment, at 0.5-5 per cent of the customs value of imported products; and (ii) a charge on plastic or “tetra-pack” packages that contain products (except for dairy produce) at MDL 0.80-3.00 per package
- Claims:
 - Violations of Article III GATT: Like domestic products are not subject to the first type of charge, while packages containing domestically produced like products are not subject to the second type of charge



UKRAINE AND THE WTO DSM

DS 423 (2011) – Moldova vs. Ukraine

- Title: Taxes on distilled spirits
- Measures:
 - Law No. 178 of 1996
- Claims:
 - Violations of Article III GATT: Ukraine applies a tax rate to domestic products that is lower than that applied on certain like (and other directly competitive or substitutable) imported distilled spirits from Moldova



UKRAINE AND THE WTO DSM

DS 434 (2012) - Ukraine vs. Australia

- Title: Australia — Certain Measures Concerning Trademarks and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging
- Measures:
 - Australia's Tobacco Plain Packaging Act 2011 and its implementing Tobacco Plain Packaging Regulations 2011
 - The Trade Marks Amendment (Tobacco Plain Packaging) Act 2011
- Claims:
 - Breaches of several provisions of TRIPs agreement
 - Breach of Art. 2.2 ATBT because the measure constitutes an unnecessary obstacle to trade and is more trade restrictive than necessary to achieve the stated health objectives
 - Breach Art. III GATT – 2.1 ATBT – Competitive opportunities
- In May 2015, Ukraine notify its request for the panel to suspend its work



UKRAINE AND THE WTO DSM

DS 468 (2013) – Japan vs. Ukraine

- Title: Ukraine – Definitive safeguard measures on certain passenger cars
- Measure:
 - Decision imposing safeguard measures on imports of certain cars
- Claims:
 - Violation of Article II and XIX of the GATT
 - Breaches of multiple substantive and procedural provisions of the Safeguards Agreement
- Panel report was published in June 2015; several violations of obligations were found; panel adopted in August 2015
- In September 2015, Ukraine notified the termination of the safeguard measure



UKRAINE AND THE WTO DSM

DS 493 (2015) – Russia vs. Ukraine

- Title: Ukraine – Anti-Dumping Measures on Ammonium Nitrate
- Measure:
 - Decision extending the application of anti-dumping measures on imports of ammonium nitrate
- Claims:
 - Violations of several provisions of the AD Agreement and VI of the GATT
 - Alleged breaches of multiple substantive (e.g. dumping determination) and procedural provisions of the AD Agreement
- Consultations ongoing



UKRAINE AND THE WTO DSM

DS 499 (2015) – Ukraine vs. Russia

- Title: Russian Federation — Measures affecting the importation of railway equipment and parts thereof
- Measure:
 - Various actions impeding the import and operation of wagons, switches and other railway equipment
- Claims:
 - Violations of several provisions of the TBT Agreement and of the GATT
 - Covers several Customs Union Technical Regulations as well as internal legislation and (in)actions



UKRAINE AND THE WTO DSM

Summary situation:

- Russia: The most active player:
 - 4 cases as a complainant; 5 cases as a respondent; 26 cases as third party
 - 5 panels active; no MAS notified
 - Agreements involved: AD, GATT, SPS & TRIMs
- Ukraine: Also an active player:
 - 4 cases as complainant; 3 as a respondent; 11 as a third party
 - No panel active (in 2015, one suspended and one panel report); no MAS notified
 - Agreements involved: GATT, AD, Safeguards, TBT & TRIPs
- Moldova: 1 case as complainant; 1 as a respondent; 2 as third party
- Armenia: Respondent in 1 case
- Three countries have not been active at all: Kyrgyzstan, Georgia and Tajikistan

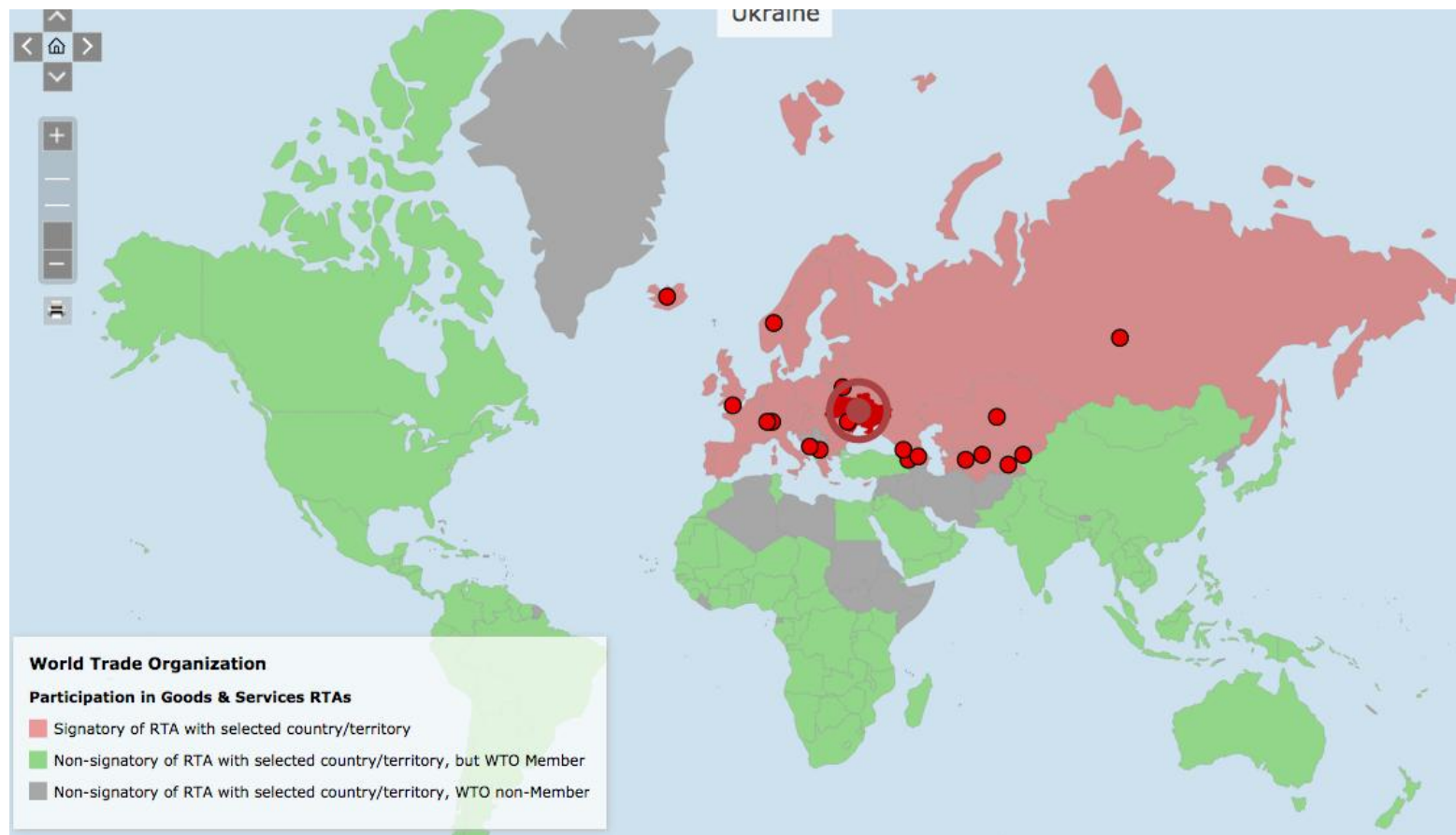


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UKRAINE AND OTHER DSMs

RTAs notified by Ukraine





UKRAINE AND OTHER DSMs

- Agreement on the Free Trade Area (ratified by Kazakhstan, Belarus, Russia, Ukraine, Armenia, and Moldova)
 - ✓ Disputes should be settled through the Economic Court of the CIS or panels established under the dispute settlement provisions of the FTA
- Bilateral agreements:
 - ✓ Diplomatic resolution mechanisms are contemplated in the old ones e.g. Ukraine-Russia FTA
 - ✓ Quasi-judicial DSMs have been included in the newer ones, based on the WTO DSM e.g. Ukraine-Montenegro FTA



SOURCES OF INFORMATION

- Webpage dedicated to [dispute settlement](#)
- Dispute Settlement Understanding ([English](#)) ([Ukrainian](#), unofficial version)
- Updated [list of disputes](#)
- Disputes by [WTO agreement](#)
- [Map of disputes](#) between WTO Members
- Course online on [WTO dispute settlement](#)
- [WTO Analytical Index](#)
- [Appellate Body Repertory of Reports and Awards](#)
- [One page summaries of disputes](#)
- [Video about the WTO dispute settlement mechanism](#)
- “Case studies of WTO dispute settlement”